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In The

Supreme Court of the United States

No. 78-479

STANLEY D. EDMONDS,

Petitioner,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals sitting *en banc* (Pet. App. 49)[1] is reported at 577 F.2d 1153. The panel decision of the Court of Appeals dated May 6, 1977 (Pet. App. 22), is reported at 558 F.2d 186. The memorandum order of the United States District Court for the Eastern District of Virginia dated March 3, 1976 (Pet. App. 15), is not reported; the initial decision of the United States District Court for the Eastern District of Virginia dated September 3, 1975 (Pet. App. 1), is not reported.

[1] The opinions below are reproduced in the Appendix to the Petition for Certiorari and will be referred to by the reference "Pet. App.". The Joint Appendix will be referred, to by the reference "App."

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1978. No petition for re-hearing was filed. The petition for a writ of certiorari was filed on September 11, 1978. The petition was granted on November 6, 1978. The jurisdiction of this court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether in an action brought by an injured longshoreman under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereinafter LHWCA) a defendant shipowner is only responsible for that portion of the total damages attributable to its negligence.

STATUTE INVOLVED

33 U.S.C. § 905(b), as amended, provides in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT

On March 3, 1974, the SS ATLANTIC COGNAC, a vessel owned by the respondent shipowner, arrived at the Portsmouth Marine Terminal in Portsmouth, Virginia. The ATLANTIC COGNAC is a large containership which carries both lift-on/lift-off containers which are transported on deck and roll-on/roll-off containers or trailers which are stowed on vehicle decks. Nacirema Operating Company, Inc., an expert stevedoring company, had been engaged by the shipowner to discharge certain containers and trailers from the vessel.

Stanley Edmonds was a longshoreman employed by Nocirema and on the morning of March 3, 1974, he was a member of a longshore gang which had been sent by Nacirema to discharge certain trailers. Edmonds was injured when he walked behind one of the trailers which was in the process of being removed by employees of Nacirema. Edmonds walked behind the trailer in order to remove one of the securing jacks and while he was behind the trailer a truck-like vehicle called a hustler which was operated by one of his fellow longshoremen backed up into the container causing it to move backwards and pin Edmonds between the trailer and the vessel's bulkhead. There was conflicting evidence with regard to whether one of the vessel's crew members directed Edmonds to remove the jack from behind the trailer.

The case was initially tried on March 6, 7, and 10, 1975, before Judge Richard B. Kellam and a jury and after a verdict was rendered in favor of Edmonds a motion for a new trial was filed and subsequently Judge Kellam entered an order setting aside the jury verdict because of certain errors in the charge to the jury.

The case was retried before Judge John A. MacKenzie on December 16 and 17, 1975. In instructing the jury at the second trial, Judge MacKenzie directed that the jurors complete a special verdict form in which they were to state in terms of a percentage the extent to which the negligence of the shipowner contributed to Edmonds' injuries, the extent to which the negligence of Stanley Edmonds contributed to his own injuries and the extent to which the negligence of Edmonds' stevedore-employer Nacirema Operating Company, Inc., contributed to the injuries (App. 5-9). The jury determined that Edmonds' total damages were $100,000.00, that his own negligence contributed 10 percent to the total damages, that Nacirema's negligence contributed 70 percent and that the shipowner's negligence contributed only 20 percent (App. 10-11).

Following the return of the jury verdict the Court requested that the parties submit briefs with regard to whether the judgment in favor of the shipowner should be in the sum of $20,000.00 (20 percent of the total damages as determined by the jury) or $90,000.00 (90 percent of the damages as determined by the jury). The Court ruled that the damages should only be reduced by the percentage of the plaintiff's own negligence and should not be reduced by the percentage negligence of the plaintiff's stevedore-employer. In reaching this result the Court felt bound by recent decisions of the Ninth Circuit in *Shellman v. United States Lines, Inc.*, 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976)

and *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 699 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).[2]

However, Judge MacKenzie noted that he was reaching his conclusion "reluctantly" and in his view a rule which required that the shipowner only be responsible for that portion of the total damages attributable to its fault was a result which was compatible with the statutory language of 33 U.S.C. § 905(b) and he legislative history of the 1972 Amendments to the LHWCA (Pet. App. 18-19).[3]

The case was initially heard in the United States Court of Appeals before a three-judge panel consisting of Judges Widener, Butzner and Hall. In an opinion written by Judge Widener and concurred in by Judge Butzner the panel held that the shipowner was only responsible for that portion of the total damages attributable to its fault ($20,000.00), but the panel also required that in addition the shipowner should repay the stevedore its compensation lien. The Court noted that the 1972 Amendments to the LHWCA were designed to "strike a balance between the relative rights and liabilities of the three parties generally involved in litigation under the Longshoremen's Act, the injured longshoreman, his stevedore employer, and the owner of the vessel," 558 F.2d 190 (Pet. App. 31). The Court referred to this Court's decisions

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[2] In both *Shellman* and *Dodge* the Court indicated that while there was an inequity present in holding the shipowner responsible for the full amount of the damages including that portion of the damages cause by the negligence of the stevedore-employer, this was a matter which should be remedied by legislation rather than by the courts.

[3] In reaching its decision the Court below noted that it was doing so "reluctantly" and the Court stated:

> "It now appears that a 20 percent negligent shipowner must bear the entire brunt of the damage award without contribution from a 70 percent negligent employer-stevedore, who not only pays not one cent but recovers the compensation benefits paid to the employee. We invite the Court of Appeals of this Circuit to examine this matter." (Pet. App. 20-21).

in *Cooper Stevedoring Company v. Fritz Kopke*, 417 U.S. 106 (1974), and *United States v. Reliable Transfer Company*, 421 U.S. 397 (1975), and indicated: "Suffice it to say that we read them as emphasizing that courts of admiralty should formulate 'flexible and fair remedies in the law maritime,' " 558 F.2d at 193 (quoting *Reliable Transfer, supra* at 409).

Though holding the vessel responsible only for its negligence the panel was concerned about this Court's decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952), and felt that it could not deny to the stevedore repayment of its compensation lien. Thus, the Court held that in addition to paying the plaintiff the $20,000.00 judgment the shipowner should also reimburse the stevedore for its compensation lien.

A Petition for Rehearing was filed by Stanley Edmonds and the matter was reheard by the Fourth Circuit sitting *en banc*. Judge Haynsworth writing for the majority held that the shipowner is only liable for that portion of the total damages attributable to its fault ($20,000.00) but the *en banc* court declined to rule on whether the stevedore was entitled to reimbursement of its compensation lien suggesting instead that the shipowner pay the $20,000.00 into the District Court and interplead the longshoreman and stevedore.[4] The Court noted that the drafters of the 1972 Amendments repeatedly emphasized in the House and Senate Committee Reports that the vessel was not to be chargeable with the negligence of the employees of the stevedore, and it found in this legislative history clear intent on the part of Congress to limit the vessel's liability to the damage which

[4] The respondent shipowner has paid these sums into the court and a complaint in interpleader has been filed in The United States District Court for the Eastern District of Virginia.

it has caused through the application of principles of comparative negligence and stated:

> In the 1972 Amendments the Congress clearly provided that the ship was to receive no indemnity or contribution from the stevedore, and it is hardly rational to suppose that, without any right of indemnification, the Congress intended to impose a liability upon the ship may have been only slightly at fault and the stevedore very greatly so, 577 F.2d at 1155 (4th Cir. 1978) (Pet. App. 56-57).

Such a result in the view of the Court below was not a harsh result from the point of view of the longshoreman, for "[h]e is protected by a system of compensation payable to him, regardless of fault, and in amounts much larger than were provided prior to 1972. He has a right of action against the ship for damages to the extent that negligence of the ship contributed to his injury." *Id* at 1156 (Pet. App. 58)[5]

SUMMARY OF ARGUMENT

In 1972 Congress amended the LHWCA in several important respects. Among other things Congress increased substantially the benefits payable under the Act, removed fixed ceilings from disability benefits, eliminated the longshoreman's right to sue a vessel for unseaworthiness under

[5] Both the panel opinion and the *en banc* decision also discussed the question of whether Judge Kellam erred in granting a new trial to the shipowner on the basis of errors in the charge at the first trial. Both the panel decision and the *en banc* decision indicated that there was no error in Judge Kellam's decision to grant a new trial and that portion of the judgment below was affirmed. The issues relating to the propriety of the grant of a new trial are not before the Court in this proceeding and the only issue present here is whether the Court of Appeals correctly held that the shipowner is only responsible for that portion of the total damages attributable to its fault.

the doctrine of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946), denied to the vessel owner the right to seek indemnity from the stevedore based upon a breach of the stevedore's warranty of workmanlike service and expanded the coverage provisions of the Act so as to include certain classes of shoreside workers. Congress accomplished its purpose principally by amending the definition of "employee" set forth in 33 U.S.C. § 902 and by adding a new subsection (b) to § 905 of the Act.

The amended § 905(b) eliminated the longshoreman's right to sue the vessel for unseaworthiness and now the injured longshoreman is permitted to sue the shipowner only on a negligence theory. But because the warranty of seaworthiness is no longer applicable, Congress denied to the shipowner the right to seek indemnity from the stevedore based upon a breach of the stevedore's warranty of workmanlike service.

The 1972 Amendments to the LHWCA do not deal specifically with the situation where the negligence of the stevedore and the vessel owner combine to cause injuries to a plaintiff longshoreman. However, this Court is not without guidance since the statute itself and the legislative history indicate that while Congress intended to preserve the injured longshoreman's right to sue the vessel owner is negligence, Congress did not intend that the vessel owner would be held responsible for the negligence of the stevedore.

Since Congress has not enacted specific legislation to deal with this concurrent fault situation, it is apparent that the fashioning of such rules in this area has been left to the Courts and such rules should be fashioned in accordance with traditional admiralty concepts of comparative fault. The power of admiralty courts to fashion fair and equitable rules of proportionate fault was recently reemphasized in the recent decisions of *United States v. Reliable Transfer Company, Inc., supra,* and *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc., supra.*

This was recognized in the *en banc* decision below holding that the shipowner should only be responsible for that portion of the total damages attributable to its fault. Petitioner and his supporting *amici* assert that the shipowner should be held liable for not only damages attributable to its fault but also those damages caused by the fault of the plaintiff's employer, the stevedoring company, and they rely on the concept of "joint and several liability" to support their thesis. Concepts of joint and several liability as have existed at common law have no application since the shipowner and the stevedore are not "joint tortfeasors" such that the rule can apply. Moreover, the underlying justification for the common law rule of joint and several liability is not present here by virtue of the compensation scheme and increased benefit levels now available to injured workers under the LHWCA.

A rule of proportionate fault does not work an unjustified burden on the injured longshoreman since he is fully and adequately compensated for the negligence of his employer through the receipt of compensation benefits without proof of fault. The fact that he may receive less in a given case by way of compensation than he might receive from a jury is merely reflective of the trade-offs present in a workmen's compensation system. Moreover, requiring that the shipowner only pay its portion of the total damages is not a form of contribution and hence this Court's decision in *Halcyon v. Haenn Ship Ceiling and Refitting Corp., supra,* even if deemed still viable, does not bar implementation of such a rule of proportionate fault. The stevedore under the holding below is never required to pay more than its compensation obligations under the LHWCA and can never be made to pay more.

While the stevedore's compensation lien was not dealt with by the Court below *amicus* Liberty Mutual Insurance Company suggests in its brief that it is entitled to full repayment of compensation payments made to Edmonds out of any recovery he may obtain from the shipowner. We submit that there is nothing in the statute to require such a result and equitable considerations dictate that full lien reimbursement be denied where the stevedore's negligence causes all or a portion of the damages.

ARGUMENT

Under The 1972 Amendments To The LHWCA A Shipowner Is Only Responsible For That Portion Of The Total Damages Attributable To Its Fault And Is Not To Be Held Responsible For The Fault Of The Stevedore.

I.

The Statutory Language And The Legislative History Indicate That The Shipowner Is Only To Be Held Liable For Its Own Negligence

A. The Statutory Language

33 U.S.C. § 905(b) as amended, provides in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

While the statutory language does not explicitly deal with the question of the joint negligence of vessel and employer, it does contain evidence to indicate that the vessel is to be held only for the damages chargeable to its own negligence. The first sentence of § 905(b) grants a general right of recovery against the vessel for negligence. The second and third sentences are qualifications of the grant dealing with the special situation in which the employer, who would otherwise not be subject to suit, is also an owner or other party identified as a "vessel" against whom a right is granted in the first sentence. In such a case the employer is viewed for the purposes of the Act in two different capacities, on the one hand as vessel owner subject to suit and on the other hand as a stevedore liable to provide compensation benefits. *See* H.R. Rep. No. 92-1441, 92 Cong. 2d. Sess., [1972] *U.S. Code Cong. & Ad. News,* 4698, 4702-3 (1972). See *Griffith v. Wheeling Pittsburgh Steel Corp.,* 521 F.2d 31 (3rd Cir. 1975); *cert. denied,* 423 U.S. 1054 (1976); *In re Allied Towing Corp.,* 580 F.2d 702 (4th Cir. 1978).

There is a "natural presumption" that when the same words are used in different parts of a statute they are intended to have the same meaning, *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433 (1932), and it is generally held that identical words used in the same

section more than once will be so construed. *Meyer v. United States,* 175 F.2d 45, 47 (2d Cir. 1949); *Lewellyn v. Harbison,* 31 F.2d 740, 742 (3rd Cir. 1929).

If "the negligence of a vessel" in the first sentence is read to mean any negligence of the vessel at all and "the negligence of persons" in the second sentence is given a similar reading to refer to any negligence at all, then an absurd inconsistency of results appears, since the employee of an independent contractor, subject only to the first sentence, will then recover 100 percent of his damages even though his fellow employees rendering stevedoring services have committed 99 percent of the negligence, while a longshoreman employed by the vessel owner and subject to the qualification of the second sentence, would recover none of his damages at all if his fellow longshoremen committed even one percent of the negligence.

Thus § 905(b) cannot be read literally throughout and must be internally reconciled. The section may be harmonized by recognizing that the words "caused by the negligence" in the first, second, and third sentences contemplate not just the fact but the extent of causation. The words "if the injury was caused" in the second and third sentences should be read to mean "to the extent the injury was caused" and the first, or granting, sentence should accordingly be construed as qualified in the same way, to conform to the specific exceptions stated in the second and third sentences following it.

The interpretation of all three sentences in this way, authorizing recovery of the portion of damages allocable to the shipowner, averts a collision of principle between these sentences and achieves consistent results in the cases with which they deal. If possible, all sections of a statute must be reconciled so as to produce a symmetrical and harmonious whole. *See, e.g., Federal Power Commission v. Panhandle Eastern*

Pipe Line Co., 337 U.S. 498, 514 (1949). Moreover, the result would comply with the expressed legislative intent, ". . . that the same principles should apply is determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons." S. Rep. No. 92-1125, 92 Cong. 2d Sess. at 12.

The resulting rule is the only possible rule consistent with the terms of the Act which is completely equitable. It charges the vessel owner with only his fair share of the damages done and leaves the longshore worker protected, since, he retains the right to receive future compensation benefits from his employer. See 33 U.S.C. § 933(f).

The Court below, 577 F.2d at 1155 (Pet. App. 55), recognized that this interpretation of the statutory language was the only way to harmonize the language of the first and second sentences of § 905(b). The Court correctly notes:

> The evident meaning and intention of the Congress was to provide for liability of the ship to the extent its fault contributed to the injury, while insulating it against liability to the extent that the stevedore's fault contributed to the injury.

Petitioner and his supporting *amici* suggest that the first and second sentences of § 905(b) were only designed to cover the situation where a shipowner acts as its own stevedore so as to preserve rights granted to longshoremen by *Reed v. S. S. YAKA,* 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.,* 386 U.S. 371 (1967). We submit this language is not designed *solely,* as suggested by petitioner, to deal with the limited situation where a shipowner acts as its own stevedore, for while these statutory provisions do confer certain rights on longshoremen which they would not otherwise have where shipowners act as their own stevedore, the provisions also serve to emphasize that shipowners

are not to be held liable for the negligence of stevedores. This was noted by Judge Haynsworth in the *en banc* decision below:

> More importantly, the second sentence of § 905(b) seems a firm declaration that the ship should not be required to pay for injuries to the extent that they were caused by people providing stevedoring services. 577 F.2d at 1155, (Pet. App. 57)

Principal reliance is placed on *Griffith v. Wheeling Pittsburgh Steel Corp., supra,* by petitioner for the proposition that Judge Haynsworth misconstrued § 905(b). The Third Circuit's opinion in *Griffith,* however, concerned only the fact of a shipowner's liability, and not its extent. On remand, the District Court apportioned liability between the 50 percent negligent shipowner and the owner *pro hac vice,* which was found 20 percent negligent while acting in its capacity as shipowner. The latter's 25 percent negligence caused by stevedoring negligence was not recoverable, since "[r]ecovery for such negligence takes the form of plaintiff's workmen's compensation payments." *Griffith v. Wheeling Pittsburgh Steel Corp.,* 452 F. Supp. 841, 847 (W.D. Pa. 1978). The Fourth Circuit reached a similar result in *In re Allied Towing Corp., supra,* decided less than one month after that court's *en banc* opinion in *Edmonds.* In *Allied Towing,* the *Edmonds* apportionment was held appropriate where the shipowner also performed its own ship repair work.

B. The Legislative History

The legislative history of the 1972 Amendments to the LHWCA is set forth in nearly identical House and Senate Reports.[6] Both Congressional Reports contain a section entitled "Elimination of Unseaworthiness Remedy" in which

[6] S. Rep. No. 92-1125, 92 Cong. 2d Sess. (1972) and H. R. Rep. No. 82-1441, 92 Cong. 2d Sess, [1972] U.S. Code Cong. & Ad. News 4698 (1972).

the committees articulated the basis of the new "negligence" remedy and as Judge Haynesworth noted in the *en banc* opinion below in the Committee reports: "[i]t was repeatedly emphasized that the vessel would be chargeable only with its own negligence and that it would not be chargeable with the negligence of the employees of the stevedore." 577 F.2d at 1156, n. 2. (Pet. App. 56-57)

Petitioner and *amicus* Liberty Mutual Insurance Company make reference to the Committee hearings and suggest that since little reference was made in those hearings to limiting the shipowners liability to that portion of the damage attributable to its fault that Congress somehow intended to create a system which would require the shipowner to pay damages based on the negligence of the stevedore.

In order to properly evaluate the legislative history and glean from a voluminous record the intent of Congress in this area it is necessary to look closely at the state of the law regarding third-party actions as it had existed prior to 1972 as well as the nature of the bills introduced in 1971 and 1972.

The bill that was ultimately reported out by the House and Senate Committees and enacted into law was radically different than the draft bills initially introduced in the House and Senate. The administration bills introduced in the Senate by Senator Prouty (S. 525) and in the House by Representative Quie (H.R. 3505) sought to change the definitions of "employer" in § 2 of the Act to include "any vessel as defined herein" and the term "vessel" to mean "a vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury. . . ." By making a vessel an employer within the meaning of the Act the administration bills would have made compensation benefits an injured longshoreman's exclusive remedy even where the injury was due to the negligence of the vessel.

The other principal bills under consideration were introduced by Senator Williams (S. 2318) and Representative Daniels (H.R. 12006). These bills would have increased the disability and death benefits under the Act, but made no change in the existing law insofar as it related to third-party actions. Thus it is not surprising that the issue of how to apportion a third-party recovery when a stevedore and shipowner were both negligent was discussed, at most obliquely, during the Committee hearings.

The bill which was ultimately enacted was reported out after a meeting attended by representatives of labor and industry, Committee members and Committee staff.[7] Many issues were discussed at that meeting and compromises were reached on many key issues which had been the subject of considerable controversy including benefit levels, the unrelated death benefit, procedural changes in the compensation system and extension of the LHWCA to certain shoreside areas. However, the participants at this meeting were unable due to the time pressures involved in reporting out a compromise prior to adjournment to agree on a formula for apportioning fault between shipowners and stevedores. Thus the fashioning of equitable rules to be applied in joint fault situations was, like the outline of the new "negligence" remedy, to be fashioned by the Courts. Coleman and Daly, *Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act,* 35 Md. L. Rev. 351, 372-373 (1976).

However, the Congress gave considerable guidance to the

[7] Senator Williams made reference to this meeting in discussing the bill he introduced (S-2318) and the amendments made during this meeting: "Subsequent to the hearings in an unprecendented fashion representatives from organized labor, from management from the administration sat down together and hammered out the provisions of a decent, fair and important Workmen's Compensation Act".

Courts in this regard by unequivocally stating in the Committee Reports that "a vessel shall not be liable in damages for acts or omissions of stevedores . . .", H.R. Rep., *supra,* at 4703, and in noting that "the admiralty concept of comparative negligence" will apply to negligence actions brought subsequent to the Amendments.

Moreover, both the House and Senate Committees were aware of the inequities which had arisen under judicial decisions of this Court construing the LHWCA, particularly *Seas Shipping Co. v. Sieracki, supra,* and *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956). *Sieracki* held that a longshoreman working on board a vessel was entitled to the benefit of the warranty of seaworthiness which prior to that time had only been available to members of a vessel's crew. As a result of this decision, the shipowner for all intents and purposes became absolutely liable for injuries to longshoremen working on board the vessel even where the unseaworthy condition was created by the stevedore. Moreover, by virtue of the exclusive remedy language of § 904 of the Act and this Court's decision in *Halcyon, supra,* the shipowner could not obtain contribution or indemnity from the stevedore.

Then in 1956 this Court handed down its decision in *Ryan* which held that the shipowner could obtain full indemnity from the stevedore where the injury was due to a breach of a warranty of workmanlike service on the part of the stevedore. While *Ryan* provided relief to shipowners it created another inequity in that the stevedore in most cases was held responsible for the full amount of the damages even though the shipowner may have been partially at fault.

It was with this background that Congress enacted the 1972 Amendments in an effort to strike a compromise. This compromise restricted the liability of the stevedore to the payment of compensation benefits under the Act and ship-

owners were to be held liable only for the consequences of their own negligence. Petitioner argues that a shipowner is to be held responsible for all damages even those attributable to the negligence of the stevedore and would require the shipowner to suffer the same inequity which prevailed during the years subsequent to *Sieracki* and prior to *Ryan*. We submit that the legislative history discloses no such intent. A participant at the hearings on the 1972 Amendments noted with regard to this phrase in the House Report:

> An interesting point is raised by the Committee reports in the following language: '... The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore. It is apparent from this language that Congress did not intend for the shipowner to be responsible for more than its proportionate part of a longshoreman's damages in a situation where the accident resulted from the concurrent negligence of the shipowner and the stevedore.

Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act,* 41 Ins. Counsel J. 63, 66 (1974).

Thus Congress clearly intended that an equitable system of proportionate fault was to apply to actions brought under the LHWCA, as amended in 1972, and left the formulation of the details of that system to the Courts. The Court below in its *en banc* decision has formulated a fair and workable system of proportionate fault which is fully consistent with the Congressional mandate.

II.

The Rule Fashioned By The Court Below Is In Accord With The Admiralty Doctrine Of Comparative Fault

A. Comparative Fault Is Well Established In Admiralty

The doctrine of comparative negligence has been uniformly applied in cases brought by longshoremen as well as seamen for ship-board injury actions (maritime torts). *See generally Pope and Talbot, Inc., v. Hawn,* 346 U.S. 406 (1953). Moreover, sharing of liability among parties whose actions have concurred to bring about a loss has long been a rule of admiralty in collision cases. In 1974 this Court extended the rule permitting contribution among joint tortfeasors to non-collision cases in order to ameliorate "the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." *Cooper Stevedoring Co. v. Fritz Kopke, Inc., supra* at 111.

The apportioned damages rule was recently reaffirmed and expanded in *United States v. Reliable Transfer Co., Inc., supra,* at 111. The Court was required in that case to decide whether this country's century-old admiralty rule of equally dividing damages in collision cases should be replaced by a rule requiring allocation of liability for damages in proportion to the relative fault of each party.

In *Reliable Transfer* the lower Court found that the running aground of the coastal tanker MARY A. WHALEN was caused 25 percent by the failure of the United States Coast Guard to maintain a breakwater light and 75 percent by the fault of the vessel. In accordance with the old rule, however, the trial court required that each party pay one-half the damage to the vessel. This Court condemned the old rule as unfair, illogical, arbitrary, archaic and frequently unjust, and noted that such a result hardly commended itself

to one's sense of justice any more than did the common law doctrine of contributory negligence. The primary policy recognized by the Court was "that a vessel is primarily negligent does not justify its shouldering all responsibility nor excuse the slightly negligent vessel from bearing any liability at all." *Id.* at 406. Accordingly, the Court rejected the former collision rule and adopted the rule requiring allocation of liability for damages in proportion to the relative fault of each party, the idea being to obtain "just and equitable allocation of damages . . . (a) goal (which) can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible." *Id.* at 411.

Therefore, it is clear that division of damages based upon comparative fault is favored, and should be adopted in all cases absent specific legislative direction to the contrary. This Court, in connection with claims arising under the 1972 Amendments to the LHWCA is free to apply any rule which equitably distributes liability, and which is not barred by the explicit wording of the statute, or the legislative history of the Amendments. The report of the House Committee on Labor and Education clearly states the Committee's intention that the admiralty concept of comparative negligence should be applied and requiring that the shipowner only pay that portion of the total damages attributable to its fault is fully consistent with the policy behind the rule of comparative negligence as set forth in *Reliable Transfer.*[8]

[8] A good discussion of the reasons why such a rule should be adopted is contained in *Croshaw* v. *Koninklijke Nedlloyd B.V. Rijswijk,* 398 F.Supp. 1224 (D. Ore. 1975). The Court in *Croshaw* determined that the plaintiff's own negligence was 50 percent responsible for his injuries, the shipowner's negligence was 20 percent responsible, and the stevedore's negligence was 30 percent responsible. While the defendant shipowner urged that the plaintiff's recovery should be reduced by the

B. This Court Need Not Await Congressional Action

Inherent in the Ninth Circuit's decisions in *Shellman v. United States Lines, Inc., supra,* and *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, supra,* and petitioner's arguments in the present case is the premise that the Courts should defer consideration and implementation of a system of proportionate fault in actions brought pursuant to the LHWCA pending specific statutory authorization by Congress. We submit that such arguments are without merit given the fact that there is evidence that Congress, in drafting the 1972 Amendments intended that the judiciary formulate appropriate rules within the framework of the favored Congressional policy of comparative fault. Moreover, since

percentage of the stevedore's negligence, the Court felt that it could not grant such a request because the Chief Judge of the District of Oregon had ruled in the previous case of *Hubbard* v. *Great Pacific Shipping Co. Monrovia,* 404 F.Supp. 1242 (D. Ore. 1975) that a defendant shipowner was not entitled to such a credit. However, while the Court in *Croshaw* felt it must conform to *Hubbard* in order to maintain uniformity of law within the District, the Court clearly indicated that in its view the 1972 Amendments required that the shipowner only be held responsible for that portion of the damage attributable to its fault.

The Court in *Croshaw* examined in detail § 905(b) of the Act and the legislative history, and noted that Congress expressly authorized the application of the doctrine of comparative negligence in third party actions brought under the Amendments. The Court further noted that this Court in *United States* v. *Reliable Transfer, Inc.,* had changed the rule of divided damages in collision cases and had condemned the application of a rule which subjects a joint tortfeasor to an arbitrary level of damages despite minimal culpability. The Court stated:

> This same intolerance for arbitrary and inequitable damage rules which motivated the *Reliable Transfer* decision moves me to adopt the approach I have outlined today. *Reliable Transfer* overruled a century and a half of judicial precedent. I need not overcome such formidable obstacles. The 1972 Amendments expressly authorize comparative negligence. Congress has left the mechanics of its application to the courts, as is customary.

398 F. Supp. at 1233.

"Congress has largely left to [the Supreme Court] the responsibility for fashioning the controlling rules of Admiralty law," *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 20 (1963), the judiciary has the power, even absent an express or implied Congressional direction, to adopt a proportionate fault system whereby the shipowner is only required to pay the damages caused by its fault.

In both *Reliable Transfer* and the recent cases of *Moragne v. State Marine Lines, Inc.,* 398 U.S. 375 (1970) and *Sea-Land Services v. Gaudet,* 414 U.S. 573 (1974), the Supreme Court has recognized that under the admiralty power the judiciary has wide latitude to formulate substantive rules of law.[9]

In *Reliable Transfer* the respondent advanced the same argument made by petitioner in the present case: that formulation of a rule of proportionate fault such as the one adopted by the Court below is a task for Congress not the Courts.

The Supreme Court rejected this argument stating:

> Finally the respondent suggests that the creation of a new rule of damages in maritime collision cases is a task for Congress and not for this Court. But the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime and 'Congress has left to this Court the responsibility for fashioning the controlling rules of admiralty law' (citations omitted). No statutory or judicial precept precludes a change in the rule of divided damages and indeed a proportional fault rule would simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established by Congress for personal injury cases. 421 U.S. at 409.

[9] The Constitution of the United States provides that "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction. . . ." U.S. Constitution Article III, § 2.

Similarly, in *Moragne,* the Supreme Court examined in detail the various statutes enacted by Congress governing the allowance for recovery for wrongful death, and concluded that while Congress had never dealt specifically with wrongful death actions occurring within state territorial waters, nevertheless the Court could find "that Congress has given no affirmative indication of an interest to preclude the judicial allowance of a remedy for wrongful death." Thus, the Supreme Court in order to remedy what it considered to be an absurd anomaly in the law, created a non-statutory maritime cause of action for wrongful death.

In the present case, if a rule of proportionate fault is not adopted, the shipowner is faced with an unfair and unjust situation, where, though determined to be only 20 percent negligent, nevertheless, it must bear 90 percent of the plaintiff's damages. The same type of unfairness and absurdity which motivated this Court in *Moragne* and *Reliable Transfer* is present in this case. Congress has specifically approved the concept of proportionate fault and there is nothing in the statute or the legislative history which even suggests that Congress intended to exclude the application of proportionate fault concepts such as that adopted by the Court below. Thus, in the absence of explicit Congressional direction to the contrary, this Court, consistent with the policy set forth in *Reliable Transfer* favoring fair and equitable rules of proportionate fault, should affirm the decision below.

III.

This Court's Decisions In Halcyon Lines v. Haenn Ship Ceiling And Refitting Corp., 342 U.S. 282 (1952) And Pope And Talbot, Inv. v. Hawn, 346 U.S. 406 (1953) Do Not Require Reversal Of The Decision Below

Petitioner refers to this Court's decision in *Halcyon* and indicates that the establishment of a rule of proportionate fault whereby a shipowner is only to be held responsible for its portion of the damages is violative of the no-contribution rule of *Halcyon* and its corollary *Pope and Talbot v. Hawn, supra.*

The facts of *Halcyon* are quite simple. Salvador Baccile, an employee of Haenn Ship Ceiling and Refitting, was injured aboard a ship owned by Halcyon Lines. The jury determined that Haenn was 75 percent responsible and Halcyon 25 percent responsible for the damages. The Court of Appeals ordered that Haenn, Baccile's employer, contribute *damages* in an amount not to exceed the compensation benefits to which Baccile would be entitled. The Supreme Court reversed, stating that it would not judicially apply the doctrine of contribution to non-collision cases in the absence of direct congressional guidance.

In *Hawn* a carpenter was injured as a result of the concurring negligence of his employer and the shipowner. Relying on its prior decision in *Halcyon* the Court held that the judgment against the shipowner should not be reduced by the amount of the compensation benefits paid to Hawn by his employer since that would be the equivalent of contribution.

Both *Halcyon* and *Hawn* are precedents more than a quarter of a century old. In the interim there have been vast changes in the LHWCA by virtue of the 1972 Amendments; this Court in *Cooper Stevedoring Co. v. Fritz Koepke, Inc., supra,* has specifically held the doctrine of contribution ap-

plicable in non-collision admiralty actions thus emasculating the primary holding of *Halcyon;* and indemnity jurisprudence based upon *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co., supra,* and its warranty of workmanlike service was judicially created and legislatively overruled.[10]

Moreover, the LHWCA at the time of the *Halcyon* case was far different than the present Act. The Supreme Court in *Halcyon* in reversing the decision of the Third Circuit indicated that it would not apply the doctrine of contribution to non-collision maritime cases and the Court did not have occasion to deal with the question of the stevedore's compensation lien. The LHWCA as it existed in 1952, at the time of the *Halcyon* case, required the employee to elect whether he would accept compensation or proceed with an action against a third-party tortfeasor and at that time the injured longshoreman could not obtain an adjudication of the amount of workman's compensation benefits due or to become due. Thus, at the time of trial, it was impossible to determine the amount of statutory compensation benefits to which the injured employee would be entitled and any contribution judgment which the vessel owner would obtain from the stevedore would only be payable to the shipowner on a weekly basis. Thus, both parties in *Halcyon* acknowledged that the Third Circuit's decision which limited the employer's liability for contribution to the amount of compensation benefits paid or to become due was unworkable and the Court noted that "[b]oth parties claim that the decision below limiting an employer's liability for contribution to those uncertain amounts recoverable under the Harbor Workers' Act is impractical and undesirable." 342 U.S. at 284.

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[10] Learned commentators have suggested that *Halcyon* is no longer viable and the Court's attention is directed to *Coleman* and *Daly,* supra at 392-397.

Today this situation no longer exists. By virtue of the 1959 Amendments to the LHWCA the injured worker need not elect whether to receive compensation or to pursue a third-party suit and the longshoreman can proceed within the administrative framework set up in the Department of Labor to obtain a prompt adjudication of the amount of compensation benefits to which he is entitled either during informal proceedings before the Deputy Commissioner or at a formal hearing before an Administrating Law Judge. Even in cases involving death and permanent disability the amount of benefits, even those to be paid in the future, can be accurately projected based upon the life expectancy of the beneficiary. Thus by the time most third-party actions come to trial the amount of the compensation lien is either liquidated or easily calculated.

The basic no-contribution holding of *Halcyon* has now been overruled by the subsequent decision of *Cooper Stevedoring Co., supra.* While *Cooper* does indicate that *Halcyon* is still viable in the limited situation wherein contribution is sought from an employer who is statutorily immune from suit, this Court emphasized that its holding was based principally on the fact that Congress in enacting the 1972 Amendments to the LHWCA had sought to "re-emphasize Congress' determination that as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy." 417 U.S. at 112-13.

Thus to the extent that *Halcyon* limited the employer's liability to its obligations under the Act it is still good law, and since the holding of the Court below does not require that an employer contribute "damages," there is nothing in *Halcyon* to prohibit implementation of a system whereby the shipowner is liable only for its portion of the damages. This rule in no way increases the stevedore's obligation to its em-

ployee since its potential liability is never any greater than its compensation exposure under the LHWCA.

Similarly *Hawn* must be viewed in its historical context. In 1953, at the time of the decision in *Hawn,* an injured longshoreman could sue the shipowner for unseaworthiness under the *Sieracki* doctrine, yet the shipowner had no recourse against the stevedore for contribution by reason of *Halcyon.* Moreover, since *Ryan Stevedoring Corp. v. Pan-Atlantic Steamship Co., supra,* had not yet been decided the shipowner did not have a right of indemnity either. Since the shipowner was responsible, by virtue of *Sieracki,* for all of the injured longshoreman's damages, and no claim over against the stevedore was available to the shipowner, the stevedore was always entitled to recoup its entire compensation lien in order to prevent double recovery by the injured longshoreman. Thus any reduction in the shipowner's liability would be a form of contribution under the state of the law as it existed in 1953.

However, under the LHWCA as it exists by virtue of the 1972 Amendments, the vessel owner's liability is only to be based on its own negligence, not on the fault of the stevedore as was the case under the unseaworthiness doctrine. Since the vessel owner need only pay damages to an injured longshoreman under the 1972 Amendments for the damages attributable to its own fault, no danger of double recovery exists, and the vessel owner's liability is in no way reduced by requiring the stevedore to fulfill its obligation to pay benefits under the Act. Thus requiring the stevedore to pay compensation to the injured man and perhaps not be able to recoup from the shipowner all payments made is not a form of contribution.

The question of whether the shipowner should only be responsible for that portion of the damages attributable to its fault was not advanced by any of the parties in either

Halcyon or *Hawn* and thus this Court had no occasion to consider the validity of such theories. It is an established rule that:

> (a) decision is not authority as to any questions of law which were not raised or presented to the Court and were not considered and decided by it, even though they were logically presented in the case and might have been argued, and even though such questions, if considered by the Court, would have caused a different judgment to be given.

H. Black, *Law of Judicial Precedence* 27 (1912). Thus, we submit that given the extensive changes in the LHWCA since *Halcyon* and *Hawn,* those decisions do not preclude affirmance of the *en banc* decision below.

Moreover, defendant submits that *Halcyon,* even if still viable, is inapplicable because the shipowner in the present case seeks no contribution from the plaintiff's stevedore employer.

33 U.S.C. § 905(b) provides in pertinent part that the employer "shall not be liable to the vessel for such *damages* (i.e. the damages paid an injured longshoreman by a negligent vessel owner) directly or indirectly" (emphasis added). The drafters of the 1972 Amendments to the LHWCA intended this language to eliminate the usual *Ryan* indemnity suit whereby the stevedore employer was subjected to dual liability for compensation benefits and damages. The application of a rule of proportionate fault in no way increases the stevedore's exposure or requires it to respond in damages to the shipowner or the injured worker. The stevedore's maximum exposure is limited to the amounts and schedules set forth in the Act and the stevedore is not called upon to reimburse the shipowner for any damages paid by the shipowner to the plaintiff. *See generally Smith v. Rivest,* 396 F. Supp. 379 (E.D. Wis. 1975)

Thus, the utilization of a proportionate fault concept is different from contribution since the stevedore is not to pay any more to its employee than its workmen's compensation obligation.

Contribution is basically an equitable doctrine whereby two or more parties liable in common to a third share liability. Since the stevedore is not liable to the plaintiff except by virtue of the workmen's compensation scheme, there can be no possibility of contribution. See. W. Prosser, *The Law of Torts,* § 50 at 309 (4th Ed. 1971)[11] Thus the employer under the rule of the Court below is required to do no more than he would be required to do by statute had no third-party shipowner become involved.

Moreover, careful consideration of the fundamental distinctions between damages at law and workmen's compensation payments and the effect of the 1972 Amendments to the LHWCA demonstrates that the alleged conflict between a rule of proportionate fault and the bar to contribution as developed in *Halcyon* and *Hawn* is illusory. There is a significant difference between compensation payments and the contribution forbidden by *Halcyon* and *Hawn* as well as the proscribed payment of damages under § 5(b) of the LHWCA.[12]

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[11] Judge Friendly recently defined contribution as that principle whereby:

> a tortfeasor against whom a judgment is rendered seeks to recover proportional shares of the judgment "from other joint tortfeasors whose negligence contributed to the injury and who are also liable to the plaintiff" *Zapico* v. *Bucyrus Erie Co.,* 579 F.2d 714, 718 (2nd Cir. 1978), *quoting Dawson* v. *Contractors Transport Company,* 467 F.2d 727 (D.C. Cir. 1972)

[12] The distinction between damages at law and payments occasioned by workmen's compensation acts was made by the Fourth Circuit long ago in *Crab Orchard Improvement Co.* v. *Chesapeake O. Ry. Co.,* 115 F.2d 277 (4th Cir. 1940):

> [C]ompensation from a Fund is not measured by the extent of the employee's injury; rather it is measured by the size of his

The Ninth Circuit in *Shellman* and *Dodge* and the Fifth Circuit in *Samuels* misused or misunderstood the word "damages" as used in § 905(b) and its confusion of the legislative denial of a Ryan-type indemnity to a vessel owner by a wrongdoing stevedore with the apportioning of the financial burdens of a personal injury suit in accordance with fault.

The precise language of § 5(b) is:

> ". . . and the employer [stevedore] shall not be liable to the vessel for *such damages* directly or indirectly . . . .

33 U.S.C. § 905(b) (1976) (emphasis added)

The single undisputed purpose of the language was to eliminate the former right of the vessel owner to bring a third-party action against a wrongdoing stevedore for *Ryan* indemnity—the full repayment to the vessel owner of any damages for which it was held liable, together with expenses and counsel fees—in an action brought by an injured harbor worker against the vessel owner for damages resulting from negligence or unseaworthiness. In exchange for the extinction of the vessel owner's right of indemnity from his stevedoring-employer, the injured workman was accorded vastly increased compensation benefits, while the vessel owner was

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weekly wage. Thus, instead of being an indemnity, workmen's compensation is more in the guise of a pension or an investment, and, like life and accident insurance, is not subject (in the absence of a statute or specific contractual provision) to the principle of subrogation.

Id. at 281.

The West Virginia Code which governed *Crab Orchard* had no provision for either an assignment of the empolyee's right to the employer or the right of subrogation of the insurer to the employee's rights, thus permitting a double recovery by the injured workman. Under both the LHWCA and admiralty law, such double recoveries are not permitted.

liable thereafter only for negligence. The vessel owner's liability for unseaworthiness, which formed the basis of the majority of the suits brought by injured longshoremen was eliminated. The sharing of financial responsibility in proportion to fault under the holding below calls for nothing more from a wrongdoing stevedore than it is statutorily required to pay in compensation benefits.

IV.

The Concept Of "Joint And Several Liability" Is Not Involved In This Case

Petitioner argues that by virtue of the common law doctrine of joint and several liability the shipowner should be required to pay the full amount of the damages though the stevedore's negligence may have contributed to cause the plaintiff's injuries (in the present case 70 percent). Petitioner further points to the legislative history and suggests that because there is nothing in the Senate or House Reports specifically indicating an intent to abrogate the rule of joint and several liability Congress must have desired that such a concept apply in actions brought under the 1972 Amendments to the LHWCA and thus the rule of proportionate fault contained in the decision below is somehow violative of the ancient doctrine of joint and several liability.

We submit that the concept of joint and several liability has no application in the present case and the arguments of petitioner and its supporting *amici* cannot stand close analysis. The concept of joint and several liability is discussed in its traditional terms at page 12 of Petitioner's Brief and at page 5 of the brief of the Association of Trial Lawyers of America. Under the traditional view of joint and several liability one who is injured by the wrongful act of two or

more joint tortfeasors has the option to sue each tortfeasor separately and regardless of the concurrent negligence of each respective tortfeasor recover the whole of the damages from any of the parties sued. *See* Prosser, *The Law of Torts,* § 47 (4th Ed. 1971).

However, as is correctly noted in the brief of Liberty Mutual Insurance Company a compensation-paying employer has a statutory immunity from tort liability and thus is not a "tortfeasor" nor is liability joint. (Brief of Liberty Mutual Insurance Company at 3) Thus, the doctrine of joint and several liability insofar as it only applies to situations in which you have joint tortfeasors has no application in the present circumstances. It is interesting to note that the cases referred to by Liberty Mutual are all ones in which you had true joint tortfeasors and none of the concurrently negligent parties had a statutory immunity.

Moreover, the underlying justification for the rule of joint and several liability is that the risk of insolvency on the part of one of the joint tortfeasors should be placed upon the tortfeasors themselves rather than on the innocent plaintiff. This rule is fully set forth in the recent decision of *American Motorcycle Association v. Superior Court,* 20 Cal. 3rd 578, 146 Cal. Rptr. 182, 578 P. 2d 899, 906 (1978), which is also discussed in some detail in the brief of Liberty Mutual Insurance Company. As the Court notes in *American Motorcycle* the rule of joint and several liability "recognizes that fairness dictates that the 'wronged party should not be deprived of his right to redress,' but that 'the wrongdoers should be left to work out between themselves any apportionment.' " 578 P. 2d at 906

In the present case the injured plaintiff is fully and adequately compensated for the negligence of his stevedore-employer through the very liberal compensation benefits

permitted under the LHWCA.[13] In the present case Stanley Edmonds has received statutory benefits through December 18, 1978, in the amount of $49,152.23 and he is still being paid compensation at the rate of $184.07 per week. (see brief of Liberty Mutual Insurance Company at 2) In addition Edmonds may be entitled at a later date to additional sums for permanent partial disability based on the schedules set forth in § 8(c) of the LHWCA (33 U.S.C. § 908(c)).

The foundation of the rule of joint and several liability, the protection of the injured party from the insolvency or lack of financial ability, of one of the joint tortfeasors, does not apply in the present situation since the LHWCA and the regulations provide comprehensive safeguards which insure prompt payment of all compensation benefits. 33 U.S.C. § 932; 20 C.F.R. § 703.001 *et seq.*

Moreover, a rule of proportionate fault which only holds a third-party tortfeasor responsible for its portion of the total damages is clearly fairer and more equitable than a rule such as advocated by petitioners which would impose all of the liability on the third party even where the negligence of the third party was minimal and the fault of the stevedore-employer was great. This same issue was raised before the Court below and Judge Haynsworth, in rejecting the view that the shipowner should be held accountable for more than its proportionate share of the damage, stated:

> The longshoreman, looking to the many references in the statute and its legislative history to the principles

[13] These very liberal benefits are summarized at pages 15 and 16 of the brief of the National Association of Stevedores. Under the LHWCA as it is presently written an injured longshoreman can receive ⅔ of his average weekly wage, tax free, up to a maximum of $396.78 per week. There is no maximum on the amount of disability benefits that can be received, disability benefits are escalated annually through a formula set by the Secretary of Labor and all of the injured man's medical expenses are paid in full.

> of land based negligence law, would import into those references those principles of the common law which permit full recovery by an injured plaintiff against any single joint tortfeasor but that common law doctrine is mitigated in many states by the provision of rights of contribution or of indemnity from other joint tortfeasors or has been supplanted by a system of comparative negligence. In the 1972 Amendments the Congress clearly provided that the ship was to receive no indemnity or contribution from the stevedore and it is hardly rational to suppose that, without any right of indemnification, the Congress intended to impose a liability upon the ship for all damages suffered when the ship may have been only slightly at fault and the stevedores very greatly so. 577 F.2d at 1155 (Pet. App. 56)[14]

Liberty Mutual recognizes the inapplicability of concepts of joint and several liability in the context of the present case and appears to concede (Liberty Mutual brief at 3) that the issue is not joint and several liability as one would think from an initial reading of the brief of petitioner and Liberty Mutual rather it is a question of "several liability." By "several liability" Liberty Mutual apparently is referring to a concept whereby one tortfeasor, in the present case the shipowner, will be held liable for all the damages regardless of its degree of fault.

The Court below in the language quoted above properly rejected such arguments since such a conclusion would be

[14] Most states by statute or case law permit damages to be apportioned among joint tortfeasors under theories of contribution, implied indemnity and contractual indemnity. Thus the common law rule of joint and several liability has been modified considerably such that where there are true joint tortfeasors liability is apportioned between them. This form of risk sharing is also permitted in some jurisdictions where one of the negligent parties is a compensation paying employer. *Dole v. Dow Chemical Co.* 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S. 2d 382 (1972); *Skinner v. Reed-Prentice Division Package Machinery Co.;* 70 Ill.2d 1, 374 N. E.2d 437 (1978).

totally inconsistent with the language of the LHWCA and the intent of Congress. The Court below in no way abrogated the ancient doctrine of joint and several liability rather it was a recognition that in view of the language of § 905(b), the statutory compensation scheme, and traditional admiralty rules of proportionate fault such concepts are wholly inapplicable.

V.

A Rule Of Porportionate Fault Imposes No Unjustified Burden On The Injured Longshoreman

The petitioner's brief in the present case and the *amicus* brief of the American Trial Lawyers Association rely on the Ninth Circuit decisions in *Shellman* and *Dodge* and place some emphasis on the alleged fact that the application of a rule of proportionate fault will work an injustice or place an unjustifiable burden on the injured longshoreman. We submit that such an argument is without foundation and misconceives the nature of workmen's compensation and the application of the rule of proportionate fault.

In support of its assertion that a rule of proportionate fault is unfair to the longshoreman, the Ninth Circuit in *Shellman* noted:

> We therefore reject both the *Murray Credit* and *Shellman* doctrines because they are contrary to the weight of authority and because they impose unjustified burdens upon the injured longshoreman. The Second Circuit very recently considered this problem observing: "We cannot agree that some negligence by the employer is enough to cut off the injured longshoreman's protected right to sue the ship for its own negligence.

Shellman, supra, at 680, *quoting, Landon v. Leif Hoegh*

and Co., Inc., 521 F.2d 756, 763 (2nd Cir. 1975), *cert. denied* 423 U.S. 1053 (1976).

We submit that the reliance on the quoted language from *Landon* as authority for rejecting such a note is misplaced. The quoted passage from Landon stands only for the proposition that there is no need for the injured longshoreman to prove that the injury resulted from the sole negligence of the shipowner in order to recover. No injustice or inequity is worked on an injured longshoreman by the application of the rule because he has been compensated by his employer for the employer's negligence in the form of compensation payments. The longshoreman then receives, in addition, that portion of his damages which was caused by the shipowner, a sum over and above his compensation recovery. In some situations the compensation paid to the injured longshoreman will be less than the recovery he could obtain in a third-party action against his employer. This is not an inequity or unfair burden on the injured man, as the Court in *Dodge* and *Shellman* suggests, rather it is reflective of the workmen's compensation system. Prosser states in this regard that compensation statutes strike a compromise:

> by which the workman is to accept a limited compensation, usually less than the estimate which a jury might place upon his damages, in return for an extended liability of the employer, and an assurance that he will be paid. Accordingly, even though his damages are partly of a nature not compensated under the act, he has no cause of action based on the negligence of his employer.

W. Prosser, *supra* § 80 at 531-532.

The injured employee in exchange for automatic payment of compensation benefits for work-related injuries, regardless of fault, has given up the possibility of an increased, but speculative, recovery based on his employer's negligence. It

would be incorrect to criticize the Court below for creating an unjustified burden on the injured man, since by receiving damages from a negligent third-party (the shipowner) proportionate to its relative fault, the employee receives a fuller recovery without risking his right to collect workmen's compensation.

Moreover, in the present case, it must be recognized that the plaintiff, Stanley Edmonds, at present, has a continuing right to receive and is receiving compensation benefits from his employer for temporary total disability.[15]

In addition, Edmonds, if the "Equitable Credit" is applied, will not have to pay back the compensation paid to him prior to judgment (the lien). (See Discussion of the stevedores' compensation lien *infra.*) Thus, by proving that the shipowner was 20% at fault, Edmonds will receive $20,000.00 over and above what he would have received had he only been entitled to receive compensation benefits.

VI.

Decisions From Other Circuits Support Affirmance Of The Decisions Below

Petitioner and his supporting *amici* suggest that all circuits save the Court below have rejected the view that the shipowner should only be responsible for damages attributable to its fault. While we acknowledge that the Ninth Circuit's decision in *Shellman, supra,* and *Dodge, supra,* and the Fifth Circuit's decision in *Samuels* v. *Empressa Lineas Maritimas Argentanas,* 573 F.2d 884 (5th Cir. 1978), *pet for cert. pending* are contrary to the decision of the Court

[15] In addition, Edmonds, if the "Equitable Credit" is applied, will not have to pay back the compensation paid to him prior to judgment (the lien). (See Discussion of the stevedores' compensation lien *infra* at 40.) Thus, by proving that the shipowner was 20% at fault, Edmonds will receive $20,000 over and above what he would have received had he only been entitled to receive compensation benefits.

below, we have discussed previously in this brief the reasons why we feel that those cases were incorrectly decided. Decisions from the District of Columbia Circuit construing both the Federal Employees' Compensation Act and the LHWCA have approved a concept of proportionate fault similar to the rule adopted by the Court below,[16] as have decisions in the Third Circuit.

The concept of apportioning fault in situations where the concurrent negligence of a third-party tortfeasor and an employer combine to cause injury to an employee is not a novel one and such a system has been established by case law in the District of Columbia. The most significant of these decisions are *Murray* v. *United States,* 405 F. 2d 1361 (D.C. Cir. 1968) and *Dawson* v. *Contractors Transport Corp.,* 467 F. 2d 727 (D.C. Cir. 1972).

In *Murray* the plaintiff was an employee of the United States and was injured by the joint negligence of the employer and a third-party tortfeasor. Because of the exclusive remedy provisions of the Federal Employees Compensation Act (F.E.C.A.), 5 U.S.C. §8101 *et seq.,* the third-party tortfeasor could not obtain contribution from the employer. In order to prevent the inequity which would result if the third-party tortfeasor should be forced to bear the entire liability, the Court held that the injured plaintiff was only entitled to recover ½ of his damages from the third-party tortfeasor because he had in effect, "settled" with his employer by receipt of compensation benefits.

In *Dawson* v. *Contractors Transport Corp.,* a similar situation arose and the Court held that the doctrine of *Murray* was applicable to instances in which employees had received benefits under the LHWCA and the Murray doctrine was discussed at length and with approval. See also, *Perchell* v. *District of Columbia,* 444 F. 2d 997 (D.C. Cir. 1971).

[16] Since 1928 the LHWCA has been utilized as a compensation law for all non-governmental employees working in the District of Columbia.

The "Murray Credit" as the rule of the *Murray* case came to be known has been criticized in some quarters chiefly due to the fact that the third-party judgment is reduced by 50 percent regardless of the relatives degrees of fault of the parties. However, when the concept of *Murray* is combined with the traditional admiralty rule of proportionate fault as embodied in *United States* v. *Reliable Transfer Co., Inc., supra,* the system provides a fair and more equitable means of resolving cases involving concurrent negligence.

The United States Court of Appeals for the Third Circuit has also had occasion to discuss the issue of proportionate fault and, while not holding that such a system should be adopted, at least one panel of that court has discussed the issue in dictum. *Marant* v. *Farrell Lines,* 550 F. 2d 142, 147 (3rd Cir. 1977). The Court in *Marant* discusses in some detail the rule of *Murray* as it is applied in the District of Columbia and the Court notes that in view of this Court's decision in *United States* v. *Reliable Transfer* the concept of proportionate fault is a viable one.

At least one District Court in the Third Circuit has analyzed the language of Section 905(b) in the same fashion as the *en banc* decision below and reached the conclusion that a shipowner need only pay that portion of the damages which it has caused. *Griffith* v. *Wheeling-Pittsburgh Steel Corp., supra.* The Court in *Wheeling* stated:

> "Any construction of 905(b) other than one embodying comparative negligence would result in an employee of an independent stevedore recovering full damages from a negligent vessel no matter how little negligent the vessel may have been." 452 F. Supp. at 847.

The Court went on to refer to the rule advocated by respondent and *amicus* American Export Lines, Inc. et al. (The Equitable Credit) in the following terms:

> The Equitable Credit Doctrine is a method of damage allocation which fosters fairness through the vehicle of proportionate fault. *Id.*

VII.

The Stevedore Is Not Entitled To Reimbursement Of Its Compensation Lien

A. Neither The Statute Nor Equitable Considerations Require Full Lien Reimbursement

Petitioner and his supporting *amicus* Liberty Mutual Insurance Company assume in their briefs that Liberty Mutual would be entitled to payment of the entire $20,000 judgment if the decision of the Court below is affirmed. This argument is used to imply that the longshoreman is therefore the one who bears the brunt of the loss and not the shipowner or the stevedore whose joint fault brought about the accident.

The Court below did not say this and, in fact, expressly did not rule on the distribution of the $20,000 judgment but left this to a later determination by the District Court.

The stevedore's right to seek repayment of the compensation is based upon the *equitable* doctrine of subrogation, whereby the stevedoring company has a lien upon the award. See *The Etna,* 138 F(2d) 37 (3rd Cir. 1943); *Fontana* v. *Pennsylvania R. Co.,* 106 F.Supp. 461 (SDNY 1952). *The Etna,* however, does not require that the stevedore recover its lien under all circumstances. The Court, in *The Etna,* held that the stevedoring company, under equitable principles, was entitled to subrogation, "where one, not acting

officiously, pays money on account of a legal obligation resting upon him for the imposition whereof another is held pecuniarily respossible." 138 F(2d) at 39. This language can only be taken to mean that where the injured party received full damages from a negligent third party, the stevedore is entitled to recover its lien. Nowhere in the Court's opinion is there any indication that the same result would be reached in a situation where both the third party and the stevedoring company were held negligent. In fact, the ruling seems to be limited to the particular facts of that case.

The Court in *The Etna* relied principally on Section 162 of the Restatement of Restitution which states that where one person discharges an obligation "owed by another" he is entitled to be subrogated to the position of that person against the one causing the damage. Section 162 of the Restatement and the comments thereto indicate that the subrogation remedy is designed to avoid unjust enrichment and that the remedy is one which is based on principles of equity.

Thus it is clear that the Court in *The Etna,* based its ruling on equitable principles. In holding that where a longshoreman recovers full damages from a negligent third party, the stevedore is entitled to recover its full lien, the Court was obviously seeking, under equitable principles, to prevent a double recovery by the longshoreman, and to reimburse the stevedore for its compensation exposure when the accident was caused by the fault of a third party.

Since equitable principles govern the stevedore's right to subrogation, each case must be determined according to its own facts. It would be patently inequitable for a stevedoring company, which is found to be 70% at fault, to recover its entire compensation lien and thus to escape all liability for the accident. Similarly, it would be equally unfair here for a stevedoring company found to be 70% at fault for an accident to recover the full amount of the judgment in reim-

bursement of its lien. Such a result would fly in the face of the purpose of the subrogation remedy as set out in *The Etna* and Restatement of Restitution, Section 162, which is to avoid unjust enrichment.

Such an inequity was discussed in some detail in *Croshaw* v. *Koninklyke Nedlloyd, B. V. Rijswijk,* 398 F. Supp. 1224 (D. Ore. 1975) when the Court noted that it would violate the "fundamental policies of equity" for the stevedore to profit from its own negligent conduct by recovering its equitable lien, even where the stevedore is negligent, for:

> There is no equity in the principle that a stevedore should be allowed to enforce an unmitigated lien on a personal injury judgment which has been reduced because of the stevedore's concurrent negligence. If his lien is to be truly equitable it must be diminished according to that negligence. 398 F. Supp. at 1234.

Courts in various jurisdictions have denied full subrogation where there was evidence of employer's negligence. *E.g., Brown* v. *Southern Ry.* 204 N.C. 668, 169 S.E. 419 (1933); *Witt* v. *Jackson,* 57 Cal 2d 57, 366 P. 2d 641 (1961). In *Brown,* the Supreme Court of North Carolina stated the rule in graphic terms as follows: "[H]is [the employer's] hands ought not to have the blood of the dead or injured workman upon them, when he thus invokes the impartial powers and processes of the law." 169 S.E. at 420.

It has also been suggested that Section 933 of the LHWCA, which operates to assign the longshoreman's cause of action to the stevedore employer under certain circumstances, requires full repayment of the lien in all instances.

We submit that an analysis of Section 933 and the legislative history relating to that section demonstrates that such a concern is unfounded.

The present Section 933[17] was added to LHWCA in 1959. Prior to the 1959 Amendments to Section 33, the injured longshoreman was required to elect whether to collect compensation or to pursue a third-party suit against the shipowner. The injured employee was not allowed to pursue both courses of action and he could not obtain an adjudication of the amount of workman's compensation due him so long as his third-party claim was pending. Thus, in the event an injured longshoreman sought to recover damages in a third-party suit, he was required to forego his right to receive compensation until such time as the third-party suit for damages had been concluded. The legislative history of the 1959 Amendments, S. Rep. No. 428, 86th Congress, 1st Sess., [1959] *U.S. Code, Cong. & Ad. News,* 2134, indicates very clearly that the purpose of the bill was not to vest additional rights in the employer but rather was to aid the injured worker. In amending the statute so as to permit the employee to receive compensation benefits under the Act and also to recover damages for the same injury in a third-party suit, the committee recognized that steps must be taken

[17] Section 933 of the Act provides in pertinent part:

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such persons shall commence an action against such third person within six months after such award.

* * *

(h) Where the employer is insured and the insurance carrier assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

* * *

in order to prevent the employee from receiving double compensation and this is why the statute as amended provided for the employer to be reimbursed for compensation paid to the employee in certain instances.

There is nothing in the language of Sec. 33 or the legislative history which indicates that Congress intended that the employer's right to recover the amount of its compensation paid should be absolute and not subject to either legal or equitable defenses. It is apparent that the only concern on the part of Congress, in providing a means by which the stevedore should recoup its lien, was the desire to prevent double recovery by the injured worker.

Moreover, it should be noted that Sec. 933(b) provides that acceptance of compensation under an award operates as an "assignment" to the employer of the injured longshoreman's right to recover damages against a third-party should the longshoreman not bring an action within six (6) months after an award. Thus, the statute permits the employer to pursue a claim against an allegedly negligent third-party in its own name or where compensation has been paid by an insurer, the insurer is permitted to bring the suit in its own right. Where an action is brought by the employer under Sec. 933 against the shipowner, the defense of the stevedore's contributory fault is available to shipowner, and we submit it may operate either to bar or reduce the stevedore's recovery. See *Fireman's Fund Indemnity Co.* v. *United States,* 110 F. Supp. 937 (N.D. Fla. 1953), *aff'd,* 211 F.2d 773 (5th Cir. 1954); *see also American Casualty Company* v. *South Carolina Gas Company,* 124 F.Supp. 30 (W.D.S.C. 1954).

It would be somewhat anomalous to require reimbursement of the compensation lien to the stevedore under the circumstances of the present case where the stevedore has been found to be 70% at fault when the stevedore would

not be entitled to recover back its payments in the event it had brought the action, in its own right, against the shipowner.

Under the facts of this case, a denial of repayment of compensation paid to the stevedore treats all parties fairly and equitably. The shipowner pays its proportionate share of the damages—20% of the total award. The injured longshoreman recovers from the vessel damages based on its proportionate fault ($20,000) and in addition retains all compensation paid by his employer, which in this case amounts to $49,152.23 as of December 18, 1978. Finally the stevedoring company, the party most at fault, still pays no more than its statutory obligation under the LHWCA, and in fact would receive a credit of $20,000 (amount of judgment) against payment of further compensation.

B. The "Equitable Credit"—A Means For Dealing Fairly With The Lien Question

A logical means of handling the problem of the stevedore's lien in cases involving concurrent fault of shipowner and stevedore was suggested in a well reasoned law review article authored by Daniel J. Dougherty and Joseph Cohen entitled. *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation,* 19 N.Y.L.F. 587 (1974). In this article the authors discuss both the mechanics of what has come to be known as the "Equitable Credit" as well as the legal and policy reasons favoring its adoption.[18]

[18] Cohen and Dougherty describe the mechanics of the credit as follows:

> If the employer was a joint tortfeasor, it could be impleaded or otherwise bound by the third party. However, in such a case, the actual dollar liability of the employer should not exceed the amount of the employer's dollar liability in compensation. Just

In the present case the jury returned a total damage award of $100,000 and found that the shipowner was 20% at fault, the stevedore was 70% at fault and the plaintiff was 10% at fault. Under the "Equitable Credit" formula, the plaintiff's recovery would be reduced by 80% (70% fault of stevedore plus 10% contributory fault of plaintiff) and he would be entitled to recover 20% of the total damages from the shipowner ($20,000). However, because the stevedore was 70% at fault for the accident, the plaintiff would not be required to repay the stevedore's compensation lien or any part of it ($49,152.23 as of December 18, 1978).

Numerous examples showing the mechanics of the application of the "Equitable Credit" in various situations are

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as every employee will be guaranteed *minimum* benefits of workmen's compensation, so will every employer be guaranteed a maximum liability of compensation benefits, whether directly or indirectly, for any employee's industrial accident.

The proportional amount of any employer's fault is to go in mitigation of the third party's damages, in the same fashion as the employee's contributory negligence, so that the third party actually responds to the employee only for that amount of the employee's damages as is equal to the third party's proportion of the fault.

From any recovery the employee obtains from the third party, the employee is to reimburse the employer for the compensation benefits paid. However, if any employer negligence resulted in a diminution or reduction of the employee's recovery against the third party, the employee may deduct and retain that amount from the compensation benefits to be reimbursed.

Thus, if the damages attributable to the employer's fault were less than the amount of the compensation benefits the employer would recover only the difference between the amount of the compensation benefits and the amount by which its fault reduced the employee's recovery. If the employer's fault were in excess of the compensation benefits, it would not receive any reimbursement, but neither would it be liable for any excess. In such situation the loss to the employee is the consideration for the absolute right to compensation benefits regardless of fault. *Cohen and Dougherty, supra* at 606.

contained in *Coleman and Daly, supra.* The credit concept is also discussed with approval in an article by J. R. Shorter entitled *In the Wake of the 1972 Amendments to the LHWCA: The Vessel's Rights Against the Stevedore,* 7 J. Mar. L. & Comm. (1976).

A rule for the handling of the stevedore's lien as advocated herein is entirely consistent with the policy of porportionate fault in maritime cases as set forth by this Court in *United States* v. *Reliable Transfer, supra,* since it provides for a sharing of the financial burden of an injury producing accident by all parties shown to be at fault.

Similarly, such a rule would tend to promote safety in the industry, one of the principle concerns of Congress in adopting the 1972 Amendments. The legislative history of the Amendments demonstrates the concern on the part of Congress about the high accident rates in the longshoring industry and the LHWCA was seen as a means of providing an incentive for the stevedore employer to improve working conditions and promote safety. The Senate Report provides in part:

> ". . . assuring that the employer bears the cost of unsafe conditions, [will] serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.
>
> This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry. . . ."

S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 2 (1972).

If the stevedore employer is permitted to recover its compensation lien in all cases where there is some fault on the part of the vessel, regardless of its own fault, then there is little financial incentive for the stevedore to promote safety and prevent accidents. The handling of the lien as advocated by the shipowner herein will provide the necessary incentive by barring reimbursement of a portion of the compensation lien where the evidence demonstrates negligence on the part of the employer.

It should also be noted that the stevedore's lien often has a substantial impact on the settlement of cases both before and after the institution of litigation. In many third-party claims brought against a vessel, some fault on the part of the stevedore has contributed to the accident and in such cases it often is very difficult, given the presence of the stevedore's lien, for the shipowner and the injured longshoreman to settle the third-party claim. This is particularly true in cases where the negligence on the part of the vessel is questionable, the fault of the stevedore is substantial and because of serious injuries to the plaintiff the compensation lien is high. Under such circumstances the case will always be tried unless the stevedore is willing to waive repayment of a portion of its lien; however, there is little incentive for the stevedore to take such a step in the absence of some system such a shipowner advocates here which would deny the stevedore reimbursement of at least a portion of its lien where negligence of the stevedore has contributed to the plaintiff's injuries.

It is only when the stevedore is required to assume a portion of the financial responsibility where its fault has contributed to the accident that fair settlement among all interested parties can be accomplished and needless, expensive litigation can be avoided. A denial of reimbursement of the lien when the stevedore is concurrently at fault for the accident provides the fairest method of accomplishing this result

and is in keeping with the intent of Congress in enacting the 1972 Amendments of the LHWCA.

The desirability of requiring all parties at fault to share equitably in the financial burdens of compensating an injured longshoreman for his injuries was expressed succinctly by the Third Circuit in *Marant, supra* wherein the Court stated:

> The concurring opinion expresses concern that any credit or apportionment rule would lead to increased litigation and that, even "if" the present rule is unfair, change should come from Congress. This court being already inundated with LHWCA litigation to interpret the 1972 amendments, it is difficult—though concededly frightening—to imagine an increase. It would seem as likely, however, that a rule which equitably apportioned liability according to fault might decrease litigation and promote settlement, especially by removing the incentive of a large judgment against a shipowner who is only partly at fault. As the Supreme Court has recently observed: "Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements." *Marant, supra* at 147, *quoting, Reliable Transfer, supra* at 408.

We submit that a rule of proportionate fault such as that advocated here will tend to promote out-of-court settlements and will ease the congestion in the federal courts which concerned Congress when it enacted the 1972 Amendments. *See* H. R. Rep. No. 92-1441, 92nd Cong. 2d Sess., [1972] *U.S. Cong. & Ad. News* 4698, 4702 (1972).

VIII.

A Rule Of Proportionate Fault Will Not Unduly Burden The Stevedore Or Constitute A Return To Tripartite Litigation

The stevedore argues that in return for the vastly increased compensation benefits it would be required to pay under the 1972 Amendments it was relieved of *Ryan* type liability to the shipowner and that if its right to recover its equitable lien is forfeited, one of the principle purposes of the amendments has been thwarted—that is, to preserve the resources of the stevedores and their carriers in order to insure that the compensation payments can be met.

It should be remembered, however, that the ultimate burden of the increased cost of compensation is borne by the shipowner. The stevedoring charges paid by the shipowner include all expenses of the stevedore and obviously include premiums for workmen's compensation insurance. It is clear, therefore, that the vastly increased cost of providing compensation benefits to longshoremen is passed along to the shipowner as one of the items included in the charge for stevedoring. The fact that the shipowner ultimately bears the cost of the increased compensation benefits was discussed during the Congressional hearings on the 1972 Amendments as well as at the oversight hearings subsequent to the amendments.[19]

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[19] Francis A. Scanlan, discussed the question of compensation premiums in testimony on the proposed 1972 amendments given before the Senate Subcommittee on Labor on behalf of the National Maritime Compensation Committee, as follows:

> "Now, this was the single most expensive item of doing business, outside of direct labor costs. And it is a tremendous cost which must be included in the stevedore's rates that are paid by the shipowners; because ultimately, the shipowner in this case must pay the bill; and he in turn, of course, will pass it on to the shippers and consignees, who use his services."

Hearings on S. 2318, S. 525 and S. 1547 before the Subcommittee on

Thus, in this case, if the plaintiff's full award is restored, the shipowner will have in effect been required to pay for the compensation benefits paid to Edmonds twice, since it not only paid the insurance premiums as part of the stevedoring charges, but would be required to repay the carrier's entire lien. This would represent a double recovery to the carrier and a double penalty to the shipowner.

The limitation of the shipowner's liability to its proportionate fault and the denial of the repayment of the stevedore's lien results in the fair sharing of the financial burden occasioned by the accident.

The suggestion is made by petitioner that affirmance of the decision below limiting a shipowner's liability to its proportionate fault will result in a return to the tripartite litigation which the 1972 amendments sought to abolish.

No such result will follow. It is clear that both the longshoreman and his employer have identical interests vis-a-vis the shipowner. The longshoreman's interest lies in showing that his injuries were proximately caused in whole by negligence of the shipowner and not by any negligence of his employer, while the employer is also interested in disproving its fault, thus preserving the right to recover its entire lien. The interest of the two are thus identical and there would be no reason for the employer to intervene in the litigation.

Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 261 (1972).

At the oversight hearings, Albert P. Kelley, Jr., Treasurer of John T. Clark & Son, a stevedore employer, testified:

> "The ships are bearing sufficient burden of costs when we have to pass on our insurance rates."

Oversight hearings on the Longshoremen's and Harbor Worker's Compensation Act (Part 1) before the Sub-comm. on Compensation, Health and Safety of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) at p. 441.

In this regard see the decision of the Ninth Circuit in *Olivas v. United States,* 506 F.2d 1158 (9th Cir. 1974).

While the employer does, under the provisions of Rule 24 of the Federal Rules of Civil Procedure, have the right to intervene to assert its equitable lien, there is no reason to do so unless it wishes to avoid payment of an attorney's fee to the longshoreman's counsel. The Courts of Appeals in the Second, Fourth and Fifth Circuits have held that an employer is obligated to pay to plaintiff's counsel a fee for recovery of its lien. *Valentino* v. *Rickners Rhederi, G.M.B.H.*, 552 F.2d 466 (2 Cir. 1977); *Swift* v. *Bolten,* 517 F.2d 368 (4th Cir. 1975); *Mitchell* v. *Scheepvaart Maatschappij Trans-Ocean,* 579 F.2d 1274 (5th Cir. 1978).[20] The effect of these decisions is that the plaintiff and his employer share proportionately in the fee paid to counsel. This further confirms the unity of purpose and interest between the longshoreman and his employer in this type of litigation and the lack of any reason for intervention by the employer.

We submit, therefore, that affirmance of the rule adopted by the Court below will in no-way encourage tripartite litigation.

[20] For a contrary ruling see the decision of the First Circuit in *Cella v. Partenreederei MS RAVENNA,* 529 F.2d 15 (1st Cir. 1975).

CONCLUSION

For the foregoing reasons, the decision of the Court below limiting the liability of the shipowner to its proportionate fault should be affirmed. To hold otherwise would perpetuate a rule which is manifestly unjust and out of step with the traditional admiralty precepts of fairness and equity.[21]

Respectfully submitted,

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[21] The recent case of *Trevellick v. Flota Mercante Grancolumbiana, S.A.* (N.D. Calif. C-77-1604-WHO January 19, 1979) is an excellent example of the inequity inherent in the position taken by petitioner. In that case a jury returned a verdict for plaintiff in the amount of $167,000, but held that the plaintiff's negligence contributed 70% to the accident, the stevedore's negligence 29% and the shipowner's negligence only 1% to the accident. Should petitioner's position be accepted, the shipowner, whose fault was found to be only 1%, would be required to pay 30% of the damages assessed, or a total of $50,000 (full judgment less contributory negligence of the plaintiff). Such a result is totally at odds with any concept of fairness and equity.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief were mailed, postage prepaid, to C. Arthur Rutter, Jr., Esquire, and Calvin W. Breit, Esquire, Messrs. Breit, Rutter & Montagna, 720 Atlantic National Bank Building, 415 St. Paul's Boulevard, Norfolk, Virginia 23510, attorneys for the Petitioner; to David R. Owen, Esquire, Messrs. Semmes, Bowen & Semmes, 10 Light Street, 11th Floor, Baltimore, Maryland 22102, attorney for Liberty Mutual Insurance Company, *amicus curiae;* to Paul S. Edelman, Esquire, Messrs, Kreindler & Kreindler, 99 Park Avenue, New York, New York 10016, attorney for American Trial Lawyers Association, *amicus curiae;* Thomas D. Wilcox, Esquire, 919 Eighteenth Street, N.W., Washington, D.C. 20006, attorney for National Association of Stevedores, *amicus curiae;* to Graydon S. Staring, Esquire, Messrs. Lillick, McHose & Charles, Two Embarcadero Center, San Francisco, California 94111, attorney for Pacific Merchants Shipping Association, *amicus curiae,* and to Randall C. Coleman, Esquire, Messrs. Ober, Grimes & Shriver, 1600 Maryland National Bank Building, Baltimore, Maryland 21202, attorney for American Export Lines, et als, *amici curiae,* this 31st day of January, 1979.

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